

Exhibit D

Confirmation Hr'g Tr.

In re Digital Media Solutions, Inc., No. 24-90468 (ARP) (Bankr. S.D. Tex. Jan. 15, 2025)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS (HOUSTON)

IN RE: . Case No. 24-90468
DIGITAL MEDIA SOLUTIONS, . Chapter 11
INC., et al., . 515 Rusk Street
Debtors. . Houston, TX 77002
. Wednesday, January 15, 2025
..... 9:58 a.m.

TRANSCRIPT OF CONFIRMATION HEARING
BEFORE THE HONORABLE ALFREDO R. PEREZ
UNITED STATES BANKRUPTCY COURT JUDGE

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1 (Proceedings commence at 9:59 a.m.)

2 THE COURT: All right. Good morning. It is
3 Wednesday, January 15th, 2025. We're here for Case Number
4 24-90468, Digital Media Solutions, for the confirmation
5 hearing. Let me take the appearances of counsel in the
6 courtroom, and then I'll take appearances online.

7 MS. SCHWARZMAN: Good morning, Your Honor. Alexandra
8 Schwarzman of Kirkland & Ellis on behalf of the debtors. I'm
9 joined by my colleagues, Mike Whalen and Elizabeth Jones.

10 MS. WHITWORTH: Morning, Judge Perez. Jana Whitworth
11 on behalf of the United States Trustee.

12 THE COURT: Thank you.

13 (Audio malfunction from 10:00:31 through 10:00:43)

14 MS. HARDY: I'm also joined by my partner, Jim
15 Burbage, on the phone.

16 THE COURT: Thank you.

17 All right. Anyone else on -- anyone on the phone
18 wish to make an appearance?

19 MR. RHODE: Can you hear me, Your Honor? Yes.
20 Benjamin Rhode from Ropes & Gray on behalf of the DIP lenders,
21 Your Honor. Thank you.

22 THE COURT: Thank you.

23 Anyone else?

24 MS. SHIRO: Yes, Your Honor. This is Michelle
25 Shiro for the former landlord, Albany Road, and the current

1 landlord, Clearwater.

2 THE COURT: Thank you.

3 All right. Ms. Schwarzman?

4 MS. SCHWARZMAN: Good morning, Your Honor. Alexandra
5 Schwarzman on behalf of debtors. Your Honor, we're thrilled to
6 be in front of you today seeking final approval of our
7 disclosure statement and confirmation of our plan. As you'll
8 recall, when we filed this case just about four months ago, I
9 came to you on the first day and I said, we're here to enact
10 one or more sale transactions to maximize the value of these
11 estates. Gave you a timeline. We sort of adhered to it. Said
12 we were going to be asking for a late October sale hearing and
13 hopefully going effective in November. We were close. We went
14 with an early November sale hearing, as you'll recall. We used
15 that extra time to cut a deal with our committee and to get all
16 the key stakeholders on board with what's in the plan before
17 you today. And, of course, took us a little bit more time to
18 get here on confirmation than originally anticipated. But very
19 happy to tell you that we're here on an almost uncontested
20 basis.

21 We do have two formal objections that Ms. Jones will
22 argue today, as well as our case-in-chief. But we don't have
23 any objections to the economics of our plan and the economic
24 treatment of stakeholders. And I think that's really a
25 testament to the hard work of all the stakeholders working

1 together to collaborate to maximize value for the benefit of
2 all parties in interest.

3 So before I cede the podium, I just do want to extend
4 a big thank you to all the other parties in this case, the DIP
5 lenders, the prepetition lenders, to the Committee, and to
6 Ms. Whitworth. Although she's opposing us today, she's been
7 delightful to work with throughout this case. And, of course,
8 to Your Honor and your chambers. And I would be remiss --

9 UNIDENTIFIED: (Indiscernible).

10 AUTOMATED VOICE: Conference muted.

11 MS. SCHWARZMAN: I'd be remiss if I didn't mention
12 the company and its management team and its employees. This is
13 a founder-run business, and there's really no substitute for
14 the passion and the dedication that founders bring to their own
15 business. The management team has worked tirelessly to keep
16 the business not just together but thriving throughout this
17 period. I really do believe the headwinds that DMS faced are
18 in the rearview mirror. The business has been doing great
19 since we've been in bankruptcy. And the employees have been
20 working just tirelessly to set the company up for a bright
21 future. So a huge thank you to them.

22 And without further ado, I'll cede the podium to
23 Ms. Jones.

24 THE COURT: All right. Let me see if anyone else
25 wants to be heard in the nature of an opening statement. And

1 please, on the phone, if you would hit "five star," and I will
2 unmute you if you want to speak.

3 All right. Any other opening statements?

4 All right. Ms. Jones, I guess you're up.

5 MS. JONES: Good morning, Your Honor. Elizabeth
6 Jones of Kirkland & Ellis on behalf of the debtors. As my
7 colleague, Ms. Schwarzman, said, we're very pleased to be here
8 today seeking final approval of the disclosure statement and
9 confirmation of the plan. Your Honor, if okay with you at the
10 start, we'd propose moving our evidence in support of the plan
11 into the record.

12 THE COURT: Yes, that makes sense.

13 MS. JONES: Your Honor, the debtors first filed a
14 witness and exhibit list at Docket Number 633 and then a
15 supplemental witness and exhibit list last night at Docket
16 Number 641. We'll refer to Docket Number 641 for purposes of
17 moving evidence into the record. Your Honor, we've identified
18 two witnesses in support of our case-in-chief and also listed
19 their declarations on the exhibit list.

20 The first is Mr. Zachary Rose, who is the chief
21 restructuring offer [sic] of the debtors. Your Honor, his
22 declaration is listed as Exhibit Number 3 on the witness and
23 exhibit list, and his declaration is in support of confirmation
24 of the plan. Your Honor, while Mr. Rose is here today, we
25 would propose to move his declaration into evidence in lieu of

1 live testimony, and we're not currently aware of any intent to
2 cross-examine or to oppose his declaration. But again, he is
3 here if there are any questions or if anyone wishes to do so.

4 THE COURT: All right. So does anyone object to the
5 admission into evidence as to direct testimony, the declaration
6 of Zachary Rose found at 641-1? All right. That will be
7 admitted.

8 Does anyone wish to cross-examine Mr. Rose? All
9 right. That's admitted.

10 (ECF Number 641-1 admitted into evidence)

11 MS. JONES: Thank you, Your Honor. Moving on to our
12 next witness, Mr. Jared Paul. He is from our claims and
13 balloting agent, Omni Agent Solutions. Mr. Paul is our
14 declarant in support of the voting report and the review of
15 both the ballots and the opt-outs. His declaration is found at
16 Exhibit Number 4 attached at -- to 641-2. So unless anyone
17 here wishes to cross-examine, he's here in the room, but we
18 would again propose to move his declaration into evidence in
19 lieu of live testimony.

20 THE COURT: All right. Does anyone object to the use
21 of the declaration of Mr. Paul found at 641-2 as his direct
22 testimony? All right. That will be admitted.

23 Does anyone wish to cross-examine? All right, those
24 are both in.

25 (ECF Number 641-2 admitted into evidence)

1 MS. JONES: Thank you, Your Honor. The rest of the
2 exhibits listed on Docket 641 are probably going to be attached
3 if going through Docket Number 633. Those were previously
4 filed, although I believe the one affidavit that we filed last
5 night with respect to the first amended plan supplement, which
6 is listed as Number 17 on our witness and exhibit list, but
7 that should be 641-3.

8 THE COURT: All right. Does anyone have any
9 objection to the admission of 641-3 and 634-1 through 17? All
10 right. There are no objections. Those will all be admitted.

11 (ECF Numbers 641-3 and 634-1 through 634-17 admitted into
12 evidence)

13 MS. JONES: Thank you, Your Honor. Your Honor, that
14 concludes our evidentiary portion, so if okay with you, we'll
15 move on to our case-in-chief.

16 THE COURT: Yes, go ahead.

17 MS. JONES: Thank you, Your Honor.

18 Last night, the debtors filed a confirmation brief
19 seeking final approval of the disclosure statement and
20 confirmation of their plan at Docket Number 637. Your Honor,
21 starting first with final approval of the disclosure statement,
22 following the conditional approval of the disclosure statement
23 on December 9, the debtors commenced solicitation with the
24 solicitation version of the disclosure statement filed at
25 Docket Number 522. Your Honor, the debtors complied with the

1 conditional disclosure statement order, the Bankruptcy Code,
2 and the bankruptcy rules in solicitation of the plan as further
3 set forth in our brief, and Your Honor, as set forth in the
4 brief, we believe the disclosure statement contained adequate
5 information to provide holders of claims and interest with
6 enough information to determine whether or not to vote to
7 accept the plan.

8 Your Honor, I'm happy to walk through that, but
9 otherwise, we would rest on those papers. There's no objection
10 to the final approval of the disclosure statement, but we're
11 happy to answer any questions or address any objections live on
12 the record.

13 THE COURT: All right. Does anyone object to the
14 final approval of the disclosure statement? All right.
15 Hearing no objection, I've reviewed the disclosure statement,
16 and I do believe that it contains adequate information, so I'm
17 going to approve the disclosure statement.

18 MS. JONES: Thank you, Your Honor.

19 Your Honor, moving on now to seeking confirmation of
20 the plan, again, in our confirmation brief, we laid out in
21 detail that we believe the plan satisfies the key factors in
22 1129. Importantly, that the plan was proposed in good faith
23 and not by any means prohibited by law, and that
24 notwithstanding that certain claims and holders of interest
25 have either rejected the plan or deemed to reject it, but it

1 can be confirmed under 1129(b) because it is fair and equitable
2 and does not discriminate unfairly.

3 Your Honor, again, I'm happy to walk through each of
4 those factors, but we laid them out in detail in our brief, and
5 there's only two formal objections now to the plan left on the
6 record. We resolved two informal comments that we've listed
7 out in the confirmation order. I'm happy to walk through
8 those, and I'm also happy, Your Honor, to jump in to address
9 the objections now or any questions that you have or if you'd
10 like to hear from the objectors first. We would just reserve
11 to respond.

12 THE COURT: Why don't we hear from the objectors
13 first and then come back? Because I don't think there's an
14 objection to anything else.

15 MS. JONES: That's correct, Your Honor, not that
16 we're aware of.

17 THE COURT: Why don't we start with Presidio first
18 because the way I read the plan, I'm not sure if that's --
19 there's -- I don't read the plan to impact their rights, so
20 let's start with that one.

21 All right. Is anyone here for Presidio Interactive
22 Corporation? If you're on the line, please hit "five star" so
23 I can unmute you. I'm going to go ahead and unmute everyone to
24 see if anyone representing Presidio Interactive is on the line.

25 AUTOMATED VOICE: Conference unmuted.

1 THE COURT: Is anyone representing Presidio
2 Interactive Corporation online?

3 All right. I don't hear any objection to that, so
4 why don't we go to the U.S. Trustee, Ms. Whitworth.

5 MS. WHITWORTH: Thank you. Thank you, Judge. Again,
6 Jana Whitworth representing the United States Trustee.

7 Your Honor, good morning again. I'm not going to
8 take a lot of time this morning, Judge. The Court is well
9 aware of the United States Trustee's position on the use of the
10 opt-out procedure and our argument substantiating that
11 position. You've heard it all before, in fact, just last week.
12 Our objection is detailed and addresses all the applicable law.
13 It's 34-plus pages long. In fact, again, we were here with you
14 last week on another confirmation hearing. So I would like to
15 take the opportunity and make a record just to summarize our
16 arguments and hit the high points.

17 First of all, I don't think it's arguable that a
18 Chapter 11 plan is a special contract between the debtor and
19 its creditors through which all of the creditors' claims
20 against the debtor are resolved by operation of bankruptcy law.
21 There's no question that Congress has authorized these
22 transactions as they relate to the debtor, who put all of its
23 assets and debts on the table, as Judge Gorsuch illustrated in
24 our Purdue case, and the creditors, whose claims against the
25 debtors are also on that table. What's not on that table,

1 Judge, are the creditors' claims and rights against non-debtor
2 third parties. The Bankruptcy Code simply does not address
3 contracts and claims that are not on that bankruptcy table.
4 The creditor's claims and rights against non-debtor entities
5 belong to those creditors and not to the bankruptcy estate.
6 And federal law does not address private contracts between
7 non-debtor parties.

8 As a result of that, this Court must look to state
9 law to determine how a contract is formed between those
10 non-debtor entities and whether there is sufficient action by
11 both of those contracting parties to establish a contract.
12 Keep in mind, Judge, it's not disputed that the non-debtor
13 party's agreement to release the claims against another
14 non-debtor party entity is a contract.

15 In the plan before you, the U.S. Trustee does not
16 think there is sufficient evidence to prove all of the affected
17 non-debtor parties have agreed to the broad sweeping
18 third-party releases contained in the plan. In fact, this plan
19 holds that a party accepting the plan wipes out that creditor's
20 rights and claims against a non-debtor party. In its reply
21 brief, when we had originally filed our objection to the
22 conditional approval, the debtors assert that voting on a plan
23 constitutes consent to third-party releases because a voting
24 creditor agrees to accept or reject the entire plan. They're
25 citing a 2000 Ninth Circuit case, Bartleson, in which that

1 Court rightly holds that a Chapter 11 plan is a contract
2 between the debtor and its creditors in which general rules of
3 contract interpretation apply. I'm not disputing that. I am
4 disputing that a Chapter 11 plan is not a contract between the
5 creditors and non-debtors, third-party entities. And in this
6 case, there were actually two creditors who voted to accept the
7 plan but chose to opt out. So it's -- you know, what are their
8 rights?

9 Again, affirmative -- the debtors argue that there's
10 an affirmative duty to respond, that silence constitutes
11 waivers of those rights. Silence by failing to return the
12 opt-out form is simply not sufficient to establish an agreement
13 or contract with respect to non-debtor parties and non-estate
14 claims.

15 Looking at the evidence that was admitted earlier in
16 the form of the balloting and everything, it's interesting to
17 me, just to point out to the Court, that out of 1,500 ballots
18 and opt-out forms that were presumed to be delivered by the
19 debtor, and that's from the Omni-Agents Declaration, I
20 calculated there was 1202 ballots, Class 3 ballots and Class 4
21 ballots that were sent. Fifty-nine of those were
22 undeliverable, so that's eleven forty-three that were presumed
23 to be delivered. And then the opt-out forms, there were 378
24 opt-out forms sent. Out of those 378 opt-out forms, only 8
25 were returned. And in the ballots, there were 224. So doing

1 my little spreadsheet math using Excel Judge, there were
2 approximately 1,521 opt-outs and ballot forms that were
3 presumed to be delivered. Out of that, there were 232
4 creditors who responded to that.

5 So what does that mean? That means that there were
6 1,289 who did not respond. Almost 85 percent of the folks who
7 received these did not respond. They didn't participate in the
8 process. So effectively what's happening, Judge, by confirming
9 this plan and endorsing the opt-out provisions, this court --
10 this bankruptcy court is wiping out almost 85 percent of the
11 non-creditors' -- or excuse me, non-debtors' claims. The
12 creditors' claims against non-debtors and third parties are
13 being wiped away.

14 We -- and again, we don't believe that silence is
15 that powerful to -- these people did not participate in
16 imposing non-contract law on that, just a mere procedure that's
17 pre -- that predates the Purdue opinion. It was a process that
18 was adopted by this court and other courts in this district.
19 It's simply not -- doesn't constitute consent.

20 Again, I'm harping on this. The debtors insist that
21 it is sufficient to use a procedure to convert a party's
22 silence into consent. But the U.S. Trustee's position is that
23 inferred consent is not actual or affirmative consent.

24 With regard to the injunction, Judge, the U.S.
25 Trustee believes that the fact that the injunction provisions

1 are even needed to enforce these third-party releases shows
2 that there's no consent. So, Your Honor, at the end of the
3 day, the U.S. Trustee requests that the court uphold, sustain
4 our objection on the third -- with regard to the third-party
5 releases and do not -- and then not enter an order confirming.
6 Thank you, Your Honor.

7 THE COURT: Thank you.

8 MS. JONES: Elizabeth Jones, Your Honor, Kirkland &
9 Ellis, on behalf of the debtors.

10 Your Honor, I won't go into detail with what we
11 already responded to in the brief, but there are a few points
12 that Ms. Whitworth made that I think are worth noting. First,
13 overall, Your Honor, the third-party releases that we're
14 proposing here are consensual. The consensual aspect of
15 third-party releases in the Fifth Circuit has always relied on
16 process, whether notice and information has been sent out such
17 that parties are able to evaluate what they are being asked to
18 do and given instructions on how to act, whether they agree or
19 disagree. Our releases do that here, and our plan and
20 solicitation procedures provide that information. They clearly
21 explain that if you vote to accept the plan, you cannot opt out
22 of the releases. They explain that if you do not wish to
23 accept the releases, you can either abstain and opt out or vote
24 to reject and opt out.

25 With respect to Ms. Whitworth's comments that two

1 parties voted to accept the plan and also checked the opt-out,
2 there's nothing in the record that can go to what their intent
3 was with selecting the opt-out, whether they intended to
4 actually opt out of those releases or misunderstood the
5 instructions. Because the record is silent with respect to
6 what their intent is, the only appropriate way to calculate
7 those ballots and opt-outs is through the clear voting and
8 tabulation procedures, which explained that if you vote to
9 accept, you cannot opt out. So we are not presuming to intend
10 whether they really did or didn't want to opt out. Rather,
11 we're calculating them in accordance with the voting and
12 tabulation procedures.

13 Again, Your Honor, I think that goes to one of her
14 other points that silence is not consent here and the lack of
15 participation by a large number of parties should demonstrate
16 that parties don't really understand what's being asked of
17 them. Again, Your Honor, there's no evidence on the record
18 that a party's failure to submit a ballot or opt-out
19 demonstrates that they were unaware of what would happen. It's
20 very likely that a number of these parties read through,
21 understood, and chose to do nothing and knew that by doing
22 nothing, they would be bound to the releases.

23 So because, Your Honor, again, the record is clear
24 with what can and cannot be counted and that as we set forth in
25 our brief that the opt-out provision that we have proposed is

1 consistent with Fifth Circuit case law, there is no reason here
2 to presume that parties did not understand what they were or
3 weren't doing with respect to staying silent. So unless Your
4 Honor has any other questions, we rest on our response in the
5 brief, but I wanted to make sure to address those two
6 additional points.

7 THE COURT: All right. Does anyone else wish to be
8 heard? And if you're on the phone, I've unmuted you so you can
9 speak.

10 MR. BURBAGE: Good morning, Your Honor. Tim Burbage
11 of Willkie Farr & Gallagher on behalf of the Committee. Can
12 you hear me?

13 THE COURT: Yes, sir.

14 MR. BURBAGE: Good morning, Your Honor. Again, for
15 the record, Tim Burbage of Willkie Farr & Gallagher on behalf
16 of the Official Committee of Unsecured Creditors. I'll be
17 brief.

18 Throughout these cases, the Committee has worked
19 diligently to discharge its fiduciary duties. At the same
20 time, the Committee has also worked collaboratively with the
21 debtors and the debt lenders to reach a committee settlement
22 that provides meaningful value to general unsecured creditors
23 in these cases. The Committee is supportive of confirmation as
24 the committee settlement and subsequent modifications thereto
25 have been reflected in the plan and the confirmation order.

1 Accordingly, the Committee believes that the objections to
2 confirmation should be overruled. Thank you.

3 THE COURT: Thank you.

4 All right. Anyone else wish to be heard?

5 All right. Before the Court today is the motion to
6 confirm the Digital Media Solutions plan. I find that I have
7 jurisdiction. It's a core matter. In addition to that, I've
8 reviewed, obviously reviewed, all of the filings, the two
9 declarations that have been admitted into evidence, and
10 listened to the arguments of counsel.

11 We have two objections pending from the U.S. Trustee
12 and from Presidio. Aside from these objections, I find that
13 the plan meets the requirements of the Bankruptcy Code 1129 and
14 each of those requirements as they were detailed in the brief,
15 and I believe that plan meets all those requirements.

16 The declaration of Mr. Rose, the testimony, states
17 that he believes the plan is a good result for the creditors
18 because it provides meaningful recovery to unsecured claims
19 that are otherwise hundreds of millions of dollars out of the
20 money, and in reviewing both the liquidation analysis as well
21 as the valuation, the DIP lenders here are taking significantly
22 less than they're entitled to in order to have a recovery, a
23 meaningful recovery to unsecured creditors. So I think the
24 result in the plan is good.

25 First, let me address the Presidio Interactive

1 objection. I think that, in essence, they're asking -- their
2 objection is that nothing in the exculpatory provisions should
3 be interpreted to limit their liability. Their claims arise as
4 a result of alleged willful misconduct. That is excluded from
5 the exculpatory provisions. Obviously, the plan will likely
6 have a significant impact on their recoveries, but that is the
7 discharge provisions and not the exculpatory provisions.

8 Next, let me address the objections of the U.S.
9 Trustees, and I think Ms. Whitworth did a very good job of
10 presenting the U.S. Trustees' position. So with respect to the
11 first objection, that the Bankruptcy Code does not authorize
12 nonconsensual releases, I think the Court agrees that the
13 Bankruptcy Code does not authorize nonconsensual releases. In
14 fact, even prior to Purdue, the Fifth Circuit had a
15 longstanding precedent rejecting the use of nonconsensual
16 third-party releases, and the Supreme Court's Purdue ruling
17 rejecting them really did not change the legal landscape in
18 this circuit. You know, in clarifying, what the Supreme Court
19 said was, nothing that we have said should be construed to call
20 into question consensual third-party releases offered in
21 connection with the bankruptcy plan. So therefore, the Fifth
22 Circuit looks at the process, whether the claimants -- whether
23 the parties were given a sufficient opportunity to opt out, and
24 then that was made clear. So where you have releases that have
25 an opt-out form, I think the case law in the Fifth Circuit, as

1 it's developed the complex rules, are such that these are
2 deemed -- by failure to opt out, these are deemed to be
3 consensual third-party releases.

4 In this case, we have the situation where even if you
5 vote in favor of the plan and opt out, you can't opt out.
6 There were only two ballots that did this. One ballot was for
7 \$20. The other ballot was for \$525. While I generally don't
8 like that formulation, in this case, the language that if you
9 voted in favor of the plan, you couldn't opt out was very plain
10 and conspicuous, literally in capital letters bolted right on
11 top of the opt-out form. I think that that gave sufficient
12 notice for those parties. They had to have read that before
13 they opt out. But the -- so I think that in this particular
14 circumstance, that situation I think meets the consensual
15 requirement. That's not to say that there might not be another
16 circumstance where that might not be the case.

17 The -- in my mind, the -- having the procedures and
18 the opt-out comports with the Fifth Circuit case law, and as a
19 result, I find that these are consensual releases and overrule
20 the U.S. Trustee's objection with respect to whether the
21 opt-out mechanism provides for a consensual release.

22 Secondly, the U.S. Trustee argues that the
23 application of the injunction to enforce the third-party
24 release violates Purdue because it makes it -- somehow makes it
25 nonconsensual. Again, I think that nothing in Purdue prohibits

1 the use of an injunction to enforce consensual releases. I
2 think here the use of the injunction is really for the purposes
3 of finality, not to enforce a non-consensual release. So on
4 that basis, I would overrule the objection. So based on the
5 evidence presented, the arguments of counsel, the case law, and
6 my ruling on the record, for all of these reasons, I overrule
7 the objections and will confirm the plan.

8 MS. JONES: Your Honor, Elizabeth Jones of Kirkland &
9 Ellis on behalf of the debtors. That's all for us. Is there
10 anything else you need with respect to the confirmation order
11 that we submitted? We attached the version of the plan that we
12 were seeking to have approved. I believe it's Docket Number
13 639.

14 THE COURT: My confirmation order does not have the
15 plan attached.

16 MS. JONES: Okay. We can upload that with the
17 version of the plan attached.

18 THE COURT: All right, any further comments or
19 questions? All right, we're in recess. Thank you.

20 MS. JONES: Thank you, Your Honor.

21 (Proceedings concluded at 10:30 a.m.)

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24
25

C E R T I F I C A T I O N

I, Alicia Jarrett, court-approved transcriber, hereby
certify that the foregoing is a correct transcript from the
official electronic sound recording of the proceedings in the
above-entitled matter.

11 ALICIA JARRETT, AAERT NO. 428 DATE: January 21, 2025
12 ACCESS TRANSCRIPTS, LLC